Supreme Court, U.S.
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NO. 88-2019

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

BARRY GIBBS,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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August 7, 1989

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RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

Respondent, Barry Gibbs, respectfully requests that the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania filed by the Petitioner, Commonwealth of Pennsylvania, be denied.

PUBLISHER'S NOTE:

Original Pagination is not continuous.

From his home, Defendant was taken to a Magistrate's Office in Hawley, Pennsylvania, then to the State Police Barracks in Lords Valley, Pike County, some 40-50 miles from his home in the next county. En route to the State Police Barracks, the car got stuck in the snow. One of the officers in the rear of the car got out to push, leaving the door open. The officer remaining in the rear seat with Gibbs told the Defendant, "Now's your chance, go for it!" When the Defendant didn't move, the officer patted his gun and laughed.

When they arrived at the State Police station, Gibbs was taken to an interrogation room, and handcuffed to an eyebolt in the wall (Suppression Hearing Transcript, hereinafter S.H. at 21). Four officers, McDevitt, Welch, Bernathy, and Hague were present (S.H., 5). Defendant was read his Miranda rights,

Defendant refused to sign the form, and requested an attorney, stating, "Maybe I should talk to a lawyer. What good would it do me if I say anything?" (S.H., at 8, 10, 18-20, 29). To this, Trooper McDevitt, a close friend of the victim, replied, "I really don't know what good it would do. The only thing is I would tell the District Attorney you co-operated for whatever good that would be, but I would have no idea whether it would help your case or not." (S.H. at 10).

Trooper McDevitt stated during the Suppression Hearing (S.H. at 21) that a twenty minute time period elapsed before the Miranda form was finally signed. Due to the ineffectiveness of trial counsel, the record remains silent as to what happened during the twenty minutes it took to sign the form. In this time, however, the Pennsylvania State Troopers coerced the Defendant to

desist from requesting counsel by telling him an attorney would not be able to make it due to the big snowstorm. The Defendant was further told that he would have to wait until he got to the county jail to get an attorney because they did not have any "Public Defender forms" at the station. After the twenty minute off-the-record "discussion", Defendant signed the Miranda form. Shortly thereafter, a brief inculpatory statement was reluctantly made (S.H. at 24).[1] The further contents of this alleged statement are irrelevant

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[1] Commonwealth Exhibit C-1 is the State Police version of the Miranda colloquy and subsequent statement. Its accuracy is undermined by its "blank spots" such as the twenty minute interval between the reading of Miranda rights and the signing of the form. Defendant further does not accept nor admit the alleged accuracy of the State Police's written statements.

in the consideration of this case. Smith v. Illinois, 469 U.S. 91, (1984).

The suppression court denied Gibbs' Motin to Suppress the Statements on November 26, 1984, and eventually, a jury at the time of the December, 1984, trial, convicted Gibbs of first degree murder, and, after a separate sentencing hearing, returned with a death sentence finding pursuant to applicable law in the Commonwealth of Pennsylvania.

On June 24, 1986, the trial court denied Respondent's Motion for New Trial and Arrest of Judgment, and Respondent appealed to the Pennsylvania Supreme Court raising a variety of appealable issues well preserved as outlined therein.

On February 2, 1989, the Supreme Court of Pennsylvania reversed Respondent's conviction based, primarily,

upon Miranda v. Arizona, 384 U.S. 346 (1966), stating that the Pennsylvania State Police officers' handling of Gibbs' request that "maybe I should talk to a lawyer" was an "impermissible inducement" therefore disallowing the statement pursuant to Miranda.

On April 13, 1989, the Pennsylvania Supreme Court denied Respondent's and Petitioner's Application for Reargument. The Commonwealth of Pennsylvania has filed a Petition for Writ of Certiorari to the Supreme Court of Pennsylvania on June 12, 1989.

Pursuant to the Rules of this Honorable Court, your Respondent Barry Gibbs respectfully files this Brief in Opposition to the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Notwithstanding the Commonwealth's attempt to errode the primary issue by pointing to several related but distinguishable Miranda cases, the Pennsylvania Supreme Court accurately and appropriately found that "the statement by the authorities to (Gibbs) was an impermissible inducement and thereby tainted his admission. By conveying the distinct impression that the District Attorney would be told of his co-operation in giving a confession on the spot there occurred an inescapable inducement which cannot be condoned under our law."

With that finding, the Pennsylvania Supreme Court indicated that it would have to look no further, but would simply honor Gibbs' request for a new trial.

ARGUMENT

While stressing that the Pennsylvania Supreme Court has seriously misapplied the decisions of this Court and has effectively ruled that a suspect's equivocal reference to counsel precludes further communication, the Commonwealth patently overlooks Gibbs' constitutional rights by insisting that this Court should attempt to provide us with a single operative definition and/or procedure under Miranda to be followed in all 50 states.

Of course, that is not, nor should not be the case.

The Commonwealth's attorney in this case and in the related case of Commonwealth v. Zook, ___ Pa. ___, 553 A.2d 920 (1989), has seriously misunderstood the decisions of the Pennsylvania Supreme Court. The

Commonwealth theorizes that those decisions indicate that when an accused makes an equivocal or ambiguous request for counsel that this precludes an attempt to clarify the accused's request.

This simply is not the law in the Commonwealth of Pennsylvania. See, e.g. Commonwealth v. Waggoner, 373 Pa. Super. 23, 540 A.2d 280, 289 (1988); Commonwealth v. Davis, 363 Pa. Super. 562, 526 A.2d 1205 (1987).

Pennsylvania, like the vast majority of other courts, including the First Circuit, United States v. Porter, 776 F.2d 370 (1st Cir. 1985) cert. denied, 107 S.Ct. 2178 (1987), the Second Circuit, Anderson v. Smith, 751 F.2d 96 (2d Cir. 1984); United States v. Gotay, 844 F.2d 971 (2d Cir. 1988); the Fourth Circuit, United States v. Riggs, 537 F.2d 1219 (4th Cir. 1976); the Fifth Circuit, Nash v. Estelle, 597 F.2d

513 (5th Cir. 1979) En banc; Thompson v. Wainwright, 601 F.2d 768 (5th Cir. 1979); United States v. Cherry, 733 F.2d 1124 (5th Circ. 1984); United States v. Jardina, 747 F.2d 945 (5th Cir. 1984); the Seventh Circuit, United States Ex Rel. Riley v. Franzen, 653 F.2d 1153 (7th Cir. 1981); United States Ex Rel. Espinoza v. Fairman, 813 F.2d 117 (7th Cir. 1987); the Eighth Circuit, McCree v. Housewright, 689 F.2d 797 (8th Cir. 1982); Pittman v. Black, 764 F.2d 545 (8th Cir.) cert. denied, 106 S.Ct. 389 (1985); the Ninth Circuit, United States v. Rodriguez-Gastelum, 569 F.2d 489 (9th Cir.), cert. denied, 436 U.S. 919 (1978); United States v. Fouche, 776 F.2d 1398 (9th Cir. 1985) on remand, 833 F.2d 1284, cert. denied, 108 S.Ct. 1756 (1988); United States v. Nordling, 804 F.2d 1466 (9th Cir. 1986); Grooms v. Keeney, 826 F.2d 883 (9th Cir. 1987);

Bruni v. Lewis, 847 F.2d 561 (9th Cir. 1988); Smith v. Endell, 860 F.2d 1528 (9th Cir. 1988); and the Eleventh Circuit, Martin v. Wainwright, 770 F.2d (11th Cir. 1985); United States v. Johnson, 812 F.2d 1329 (11th Cir. 1986); Christopher v. Florida, 824 F.2d 836 (11th Cir. 1987); Owen v. State of Alabama, 849 F.2d 536 (11th Cir. 1988), as well as others,[2] has adopted the "clarification standard."

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[2]The Third and Tenth Circuits have no cases on point. The Sixth Circuit has not reached a holding on this issue. The D.C. Circuit has held that questioning must cease after an equivocal invocation of rights. See United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982). Other Federal and State Courts have addressed the issue in these cases: United States v. Olsen, 609 F.Supp. 1154 (D.C.ME. 1985); United States v. Chansrharaj, 446 F. Supp. 107 (S.D.N.Y. 1978); United States v. Prestigiacomo, 504 F. Supp. 681 (E.D.N.Y. 1981), United States v. Weston, 519 F.Supp. 565 (W.D.N.Y. 1981); United States v. Penosi, 548 F. Supp. 200 (S.D.N.Y. 1982); United States v. Rondon, 614 F.Supp. 667 (D.C.N.Y.

(footnote continued)

The "clarification standard" permits police to clarify accused's ambiguous or equivocal request for counsel. See, Waggoner, Supra., 540 A.2d at 289. However, this standard does not allow interrogating officers to use the "clarification" to coerce the accused to speak to police or denigrate the extremely important role of legal counsel

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(Footnote continued)

1985); United States v. Grullon, 496 F.Supp. 991 (E.D. Pa. 1979); United States v. DeLeon, 412 F. Supp. 89 (D. V.I. 1976); Gorel v. United States, 531 F. Supp. 368 (S.D. Tex. 1981); State v. Ladd, 431 A.2d 60 (ME.) cert. denied, 454 U.S. 1101 (1981); State v. Nash, 407 A.2d 365 (N.H. 1979); State v. Tapply, 470 A.2d 900 (N.H. 1983); State v. Sundstrom, 552 A.2d 81 (N.H. 1988); State v. Anderson, 553 A.2d 589 (Conn. 1989); State v. Wright, 477 A.2d 1265 (N.J. 1984); State v. Fussel, 174 N.J. Super. 14, 415 A.2d 351 (1980); State v. Bey, 548 A.2d 887 (N.J. 1988); State v. Moulds, 674 P.2d 1074 (Ct. App. Idaho 1983); State v. Lewis, 645 P.2d 722 (Wash. App. 1982); Daniel v. State, 644 P.2d 172 (Wyo. 1982); Giacomazzi v. State, 633 P.2d 218 (Alaska 1981).

at this stage of the criminal proceedings. See, e.g., Thompson v. Wainwright, Supra; Maglio v. Jago, Supra; Smith v. Endell, Supra.

Generally, Courts have taken three separate approaches with respect to a suspect's reference to counsel: (1) an equivocal mention of counsel requires that all questioning of the suspect must cease (See, e.g. People v. Russo, 148 Cal. App.3d 1172, 196 Cal. Rptr. 466 (1983); (2) application of a totality of circumstances test to determine if the suspect actually invoked his right to counsel (See, e.g. People v. Kendricks, 121 Ill. App.3d 442, 459 N.E.2d 1137 (1984); or (3) adoption of a rule that permits the interrogating officer to attempt to clarify any ambiguous reference to counsel made by the suspect during the custodial interrogation. (See,

e.g., United States v. Fouche, 776 F.2d 1398, 1404 (9th Cir. 1985), aff'd on rehearing, 833 F.2d 1284 (9th Cir. 1987), cert. denied, 108 S.Ct. 1756 (1988) (noting that Federal Courts are not in accord on this issue).

In the instant case, and after having been read his Miranda warning, Gibbs indicated that "maybe I should talk to a lawyer. What good would it do me to tell you?"

The interrogating Pennsylvania State Trooper indicated that "I really don't know what good it would do. The only thing is I would tell the District Attorney you co-operated for whatever good that would be. . ."

The Supreme Court of Pennsylvania indicated that its decision was "narrowly focused on the issue of whether that trooper's response constituted an impermissible misleading inducement

to Gibbs not to pursue further his ambiguous and equivocal inquiry regarding the presence of an attorney.

Regardless, under any standard, the decision of the Pennsylvania Supreme Court is entirely proper.

If Gibbs' response "maybe I should talk to a lawyer" is deemed equivocal, the police should have clarified his response in a manner such as: "you have a right to see an attorney before any questioning, do you want one, yes or no?"

No other response could suffice, especially the type the interrogating officer provided in the instant case.

If, however, the statement, "maybe I should see an attorney" were deemed an unequivocal request for counsel, and in the "same breath" questioned "what good would it do me to say any-

thing" were deemed "reinitiation" under Edwards v. Arizona, 451 U.S. 477 (1981), the response of the police in this case was still improper.

"If, however, (an accused) indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning." Miranda v. Arizona, 384 U.S. 436.

While a reponse by police to "reinitiation" like that in Oregon v. Bradshaw, 462 U.S. 1039 (1983), may arguably be considered proper, a response like the one in the instant case certainly cannot.

Contrary to what the Commonwealth asserts, the response of the police in this case was not accurate, not honest, nor in good faith.

The Commonwealth complains that

"the Pennsylvania Court has imposed a new and unjustified limit on communications between a suspect and the police . . . " Apparently, the Commonwealth would prefer the inquisitorial system of Thomas D. Torquemada over the accusatorial system we have today in which the accused still has constitutional rights that are protected under the decision in Miranda.

The Pennsylvania Supreme Court relied heavily on its decision in Commonwealth v. Hubble, 509 Pa. 497, 504 A.2d 168 (1986), which found that that suspect's utterance regarding an attorney were too imprecise to trigger the prophylactic rule barring further police interrogation as required by Edwards v. Arizona, 451 U.S. 477 (1981), reh'g. denied, 452 U.S. 973 (1981).

Accurately enough, and certainly in support of society's interest in

the continued police interrogation unfettered by checks and balances not required by the Constitution, the Pennsylvania Court, in Hubble, emphasized that "to hold that every utterance of the word 'lawyer' automatically" invokes Edwards "would be far too rigid and would not serve the interests of justice."

This holding is in accord with a long line of cases from as far back as 1897. In Bram v. United States, 168 U.S. 532 (1897), this Court held that a confession "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

In Brady v. United States, 397 U.S. 742, 754 (1970), this Court once again recognized the Bram decision:

> in such circumstances (with

> the defendant) in custody, alone and unrepresented by counsel), even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess.

To say, as the Commonwealth does, that the Pennsylvania Supreme Court decision has imposed a new and unjustified limit on communications between a suspect and the police in complete derogation of the limited prophylactic purpose of Miranda, is simply not correct: investigation officers are not required "to ignore the tenure or sense of a defendant's response to Miranda", but are required to issue that recognized warning "to assure that the individual's right to choose between speech and silence remains unfettered . . ." Connecticut v. Barrett, 479 U.S. 523,

____ (1987) (quoting Miranda v. Arizona, 384 U.S. at 469).

Further, the Commonwealth speculates that when Gibbs sought additional information in order to make a knowing and intelligent decision under the Miranda ruling, the Pennsylvania State Police were not required to merely repeat the required warning, but could address Gibbs' inquiry with one general caveat -- the police were not allowed to mislead Gibbs into answering any questions.

Stressing this requirement, the Pennsylvania Supreme Court indicated the "promises of benefits or special considerations, however benign in intent, comprise the sort of persuasion and trickery which easily can mislead suspects into giving confessions. The process of rendering Miranda warnings should proceed freely without any intruding frustration by the police."

However innocently intended, the interrogating officer's remark that "I really don't know what good (talking to a lawyer) would do" was the exact "intruding frustration" that the Pennsylvania Supreme Court was worried about.

Additionally, the Commonwealth suggests that additional guidance from this Honorable Court would allow states to do away with the three apparent separate approaches with respect to this area.

However, it must be remembered that at issue are the constitutional rights of this criminal defendant who is charged with and convicted of a capital offense and sentenced to die in Pennsylvania's electric chair.

As Mr. Justice Stevens, with whom Mr. Justice Marshall joins in dissent, stated in Connecticut v. Barrett, Supra. at 933, a disposition such as this one

raises two troublesome questions. On one hand you have a State Supreme Court which arguably granted more protection to a citizen accused of a crime than the Federal Constitution requires and on the other hand there is the basically unchallenged principle that the rule governing this area is that judges must "give a broad rather than a narrow interpretation to a defendant's request for counsel."

Further, that dissent suggests that there is no sound and sufficient reason for review by this Honorable Court merely because the Commonwealth of Pennsylvania has "asked us to rule that the State Court interpreted Federal rights too broadly and 'overprotected' the citizen. Id., citing Michigan v. Long, 463 U.S. 1032, 1068 (1983), and Michigan v. Jackson, 475 U.S. 625, 633 (1986).

Rather than being accused of "over-protecting" citizen's rights, the Pennsylvania Supreme Court should be applauded for the detail used in the Gibbs' decision. Again, looking at Hubble, the Pennsylvania Supreme Court examined the preciseness or specificity of the suspect's utterances regarding an attorney, examined whether or not the suspect had been mislead by erroneous police statements, and then, looking at the totality of the circumstances, concluded that even if the initial admission had been infirm, Hubble later voluntarily gave statements which had cured any original defect.

The State Court also, underlining its determination to maintain a balance between societal interests in police interrogation and a defendant's constitutional rights, recognized that "the

police have a legitimate responsibility to conduct investigations, including interrogations, while criminal suspects have a constitutional right to make up their own minds as to whether they want the Miranda protections."

The Commonwealth, in its haste to scuttle the judgment of the Supreme Court of Pennsylvania, seriously misreads Gibbs and misapplies this Court's holding in Oregon v. Bradshaw, 462 U.S. 1039 (1983). To an objective eye, Oregon and Gibbs are quite easily distinguished.

In Oregon, the Defendant exercised his Miranda rights and after a discrete, significant passage of time, inquired of a police officer transporting him from the station to jail, "Well, what is going to happen to me now?"

While it is clear from the face of the record that both suspects made

challenged inquiries, it is equally clear that the specific circumstances under which they were made were distinctly different in time frame, in each case.

The Oregon respondent inquired after a period of timely reflection, (after the ride from the police station to the jail), while Gibbs made an instantaneous inquiry, indeed, in "same breath" as his request for counsel under Miranda.

Moreover, no principled examination of the comments in question in Oregon and in this case can be had without recognition of specifically what was said by the Defendants in the respective settings.

Such an examination proves illuminating: the Oregon defendant's query was open-ended, and inviting the widest possible range of responses, while,

clearly, in Gibbs, no open-ended query was made, but, contrary to Oregon, the inquiry was inextricably interrelated to the request for counsel.

In Oregon, the defendant's question was answered by an officer reminding the accused, "you don't have to talk to me." 103 S.Ct. at 2835, while in the instant case the seasoned officer indicated he didn't know what good consulting with legal counsel would do for Gibbs.

By any yardstick, the Oregon response was fair, honest and within the spirit of Miranda at its practical effect, while in Gibbs, it was evasive, dishonest, unfair and filled with psychological coercion.

This Court, in the American tradition of fair play, and Constitutional rights engendered to protect a defendant in such a case, should not countenance

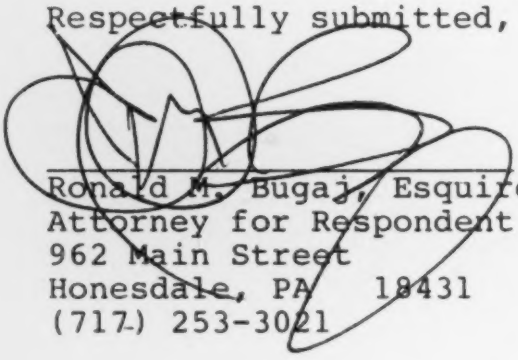
such deception.

The judgment and opinion of the Court below, the Supreme Court of Pennsylvania, should be emphatically affirmed.

CONCLUSION

For the foregoing reasons, your Respondent, Barry Gibbs, respectfully requests that the Commonwealth's Petition for Writ of Certiorari to the Supreme Court of Pennsylvania be denied.

Respectfully submitted,



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